United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1503

To be argued by
JEREMY G. EPSTEIN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1503

UNITED STATES OF AMERICA,

Appellee,

—v.—

RAUL ESTREMERA,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Raul Estremera appeals from an order entered in the United States District Court for the Southern District of New York on October 12, 1976, by the Honorable Kevin T. Duffy, United States District Judge, denying his motion for reduction of sentence made pursuant to Rule 35 of the Federal Rules of Criminal Procedure.

Statement of Facts

Indictment 73 Cr. 319, filed April 12, 1973, charged Estremera, Oscar Lee Washington, Pedro Mario Monges, and Victor Cumberbatch in Count One with bank robbery, in Count Two with bank larceny, and in Count Three with armed bank robbery in violation of Title 18, United States Code, Sections 2113(a), (b), and (d).*

* That indictment superseded Indictment 73 Cr. 193, filed March 3, 1973, which named only Estremera and Washington.

Trial commenced against Estremera * on May 19, 1975, and concluded on May 23, when he was found guilty on all counts. On June 24, 1975, Estremera was sentenced to a term of seventeen years' imprisonment.

Estremera then appealed and his conviction was unanimously affirmed by this Court on February 2, 1976. 531 F.2d 1103 (2d Cir. 1976). His petition for a writ of certiorari was denied by the Supreme Court on May 19, 1976. 425 U.S. 979 (1976).

On September 16, 1976, Estremera filed a motion for reduction of sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure. By endorsement dated October 12, 1976, Judge Duffy denied the motion. Estremera is presently serving his sentence.

ARGUMENT

Judge Duffy Properly Exercised His Discretion in Denying Estremera's Motion for Reduction of Sentence.

This appeal presents the Court with its third opportunity to review the sentences imposed by Judge Duffy

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* Prior to trial, Oscar Lee Washington and Pedro Mario Monges each entered pleas of guilty to Count One and were each sentenced to terms of eighteen years' imprisonment. Indictment 73 Cr. 319 was dismissed against Victor Cumberbatch on December 13, 1976, by Judge Edmund L. Palmieri because Cumberbatch had been transferred between federal and state custody in violation of the Interstate Agreement on Detainers. Cumberbatch was subsequently tried on a new indictment, 76 Cr. 1076, which charged him with conspiracy to commit bank robbery and possession of a firearm during the commission of a felony in violation of Title 18, United States Code, §§ 371 and 924(c)(2). Cumberbatch was convicted on both counts of that indictment on December 16, 1976, and awaits sentence before Judge Palmieri.

in this case. After Judge Duffy denied his Rule 35 motion, Oscar Lee Washington appealed from the eighteen year sentence imposed on him. This Court affirmed Judge Duffy's decision without opinion. *United States* v. *Washington*, 490 F.2d 1406 (2d Cir. 1974) (Waterman and Mulligan, C.JJ., and Bryan, D.J.). On Estremera's direct appeal, he argued that the seventeen year sentence imposed upon him was excessive and improper. The extent of the consideration given this argument by the Court is as follows:

> "Nor did the 17-year sentence fall outside the trial judge's legitimate discretion, in light of appellant's participation in the armed bank robbery. See *Dorszynski* v. *United States*, 418 U.S. 424, 440-441 (1974); *United States* v. *Tucker*, 404 U.S. 443, 447 (1972); *United States* v. *Brown*, 479 F.2d 1170, 1172 (2d Cir. 1973). Indeed, two of his coparticipants who entered pleas of guilty solely to Count 1 of the indictment were each sentenced to 18-year terms, and a panel of this court summarily affirmed the validity of that sentence against an attack similar to this one. *United States* v. *Washington*, 490 F.2d 1406 (2d Cir. 1974)." 531 F.2d at 1113.

Estremera seeks yet another review of that sentence by arguing that Judge Duffy was somehow obligated to make inquiry of the Bureau of Prisons before considering his Rule 35 motion. His argument utterly ignores both the nature of his crime and the careful consideration Judge Duffy gave the sentence when it was first imposed.

The evidence adduced at Estremera's trial, which included eyewitness testimony and bank surveillance photographs, clearly established his role in a serious and gratuitously brutal crime. As this Court observed, "[t]he

evidence . . . discloses a bank-robbery scenario duplicating what has in recent years become all too common in New York City and vicinity." 531 F.2d at 1105. Not only did Estremera and his three armed companions rob a First National City Bank branch of over $25,000, but two of these companions, Washington and Cumberbatch, beat the assistant bank manager with their weapons, a pistol and a submachine gun (Tr. 54-58, 135; GX 1-42).* During the robbery, Estremera sat atop the bank guard, Rodolfo Romero, who was prostrate on the floor, and while doing so robbed him of his watch and wallet. Estremera also brandished his pistol in Romero's face. 531 F.2d at 1105 (GX 18).

A eview of the sentencing minutes discloses the care with which Judge Duffy approached his responsibility of imposing sentence on Estremera. He stated that he had consulted with several other judges, whom he had selected "from each end of the spectrum" of severity. (Tr. of June 24, 1975, at 7). He remarked that "I have often commented on how difficult it is to sentence a fellow human being. This particular case is perhaps even more difficult than the others." (*Id.* at 24-25). He stated that he would not penalize Estremera for exercising his right to stand trial (*Id.* at 21) and would disregard allegations that Estremera was a member of the "Black Liberation Army." (*Id.* at 19). Judge Duffy also stated that he would accord no weight to the pendency of two other federal indictments against Estremera, one in the Eastern District of New York for draft evasion, and another in the Northern District of California for violations of the gun control laws. (*Id.* at 23). He acknowledged defense counsel's lengthy recitation of "all the good things" in

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* "Tr." refers to the trial transcript; "GX" refers to Government Exhibit; "Br." refers to appellant's brief; "A." refers to appellant's appendix.

Estremera's background, and then proceeded to analyze the manner in which the bank robbery had been committed and Estremera's role in it. He described the robbery as a "heinous act" and added that Estremera's behavior in robbing the guard of his valuables was "a needless and brutal act, . . . an invasion of another person's person." (*Id.* at 25).*

Nothing in the original sentencing proceeding or in Judge Duffy's decision to impose a seventeen year sentence is subject to challenge on this appeal. It is well settled that a sentence imposed within the statutory limits is not reviewable unless the sentencing judge relied on improper considerations or materially incorrect information. *Dorszynski* v. *United States*, 418 U.S. 424, 440-441 (1975); *United States* v. *Tucker*, 404 U.S. 443, 447 (1972); *United States* v. *Velazquez*, 482 F.2d 139, 142 (2d Cir. 1973). Indeed, this Court has already found that the imposition of that sentence was a proper exercise of discretion. 531 F.2d at 1113. The question on this appeal, then, is exceedingly narrow. It has been recognized that a motion for reduction of sentence is

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* The "Statement of Facts" in Estremera's brief recites that "[t]he presentence report . . . recommended a sentence of between four and a half and eleven and a quarter years." (Br. 5). This Court should be advised that the presentence report contained no such recommendation. As a review of that report, which is available for the Court's perusal in the Southern District's Probation Office, will confirm, the only reference to the four and a half to eleven and a quarter year term came in a table appended to the report in which there appeared estimates of the defendant's eligibility for parole, which varied with the length of the sentence imposed. Even the allusion of Estremera's counsel to this table during the sentencing proceeding makes clear that the presentence report did not recommend four and a half to eleven and a quarter years (Tr. of June 24, 1975, at 17-18).

"essentially a plea for leniency"; it is further recognized that "[o]rdinarily the disposition of the motion is within the sound discretion of the district judge, and the scope of appellate review is quite narrow." *United States* v. *Slutsky*, 514 F.2d 1222, 1226 (2d Cir. 1975). See also *United States* v. *Guzman*, 478 F.2d 759 (2d Cir. 1973); *United States* v. *Stumpf*, 476 F.2d 945, 946 (4th Cir. 1973); *United States* v. *Jones*, 444 F.2d 89, 90 (2d Cir. 1971); *United States* v. *Birnbaum*, 402 F.2d 24, 30 (2d Cir. 1968), *cert. denied*, 394 U.S. 922 (1969); *United States* v. *Ellenbogen*, 390 F.2d 537, 543 (2d Cir. 1968), *cert. denied*, 393 U.S. 918 (1968).

Thus, the only question is whether Judge Duffy abused his discretion in refusing to reduce Estremera's sentence. We submit that Judge Duffy was certainly entitled to conclude, on the record before him, that Estremera was no fitting candidate for the leniency contemplated by Rule 35. It is stressed in Estremera's brief that his prior criminal record consisted solely of one misdemeanor conviction. (Br. 5, 20). This statement, although accurate, gives little hint of the nature and extent of Estremera's other criminal activities. For example, a New York City policeman testified at a pretrial suppression hearing that Estremera had been identified, through fingerprints on a sale application, as the purchaser of an Armorlite AR-180 automatic rifle that had been used in the attempted murder of two police officers in Queens in January, 1973. (Tr. of May 13, 1975, at 97-99). Furthermore, Estremera is under indictment in the Northern District of California for purchasing weapons in violation of the gun control laws. Reference was made to this indictment at the time of sentence, and Estremera's counsel admitted that he had purchased weapons under an assumed name, as charged in that indictment. He argued, by way of mitigation, that Estremera was a fugitive at the time and living under an assumed name, and purchased the guns in that name for

that reason (Tr. of June 24, 1975, at 10-12). Among the weapons purchased, according to that indictment, were several semi-automatic rifles. Judge Duffy was entitled to take these incidents into consideration in imposing sentence, although there is no evidence that he did.* Nevertheless, they scarcely establish Estremera as a prime candidate for leniency.

The essence of Estremera's argument on this appeal is that Judge Duffy should have awaited further documentation of Estremera's "rehabilitation" from the Bureau of Prisons before ruling on his motion. His failure to do so, Estremera argues, constitutes an abuse of discretion and requires reversal. The most obvious rejoinder to this argument is that Estremera's motion did present Judge Duffy with ample documentation. Appended to the motion were at least eight separate documents from two different prisons (Atlanta and Lewisburg) attesting to his accomplishments as a prisoner. (A-18-A-27). These documents, whose authenticity was not questioned by the Government, provide sufficient evidence of "rehabilitation" to provide a basis for a reduction of sentence had Judge Duffy determined that a reduction was warranted. Judge Duffy obviously concluded that no reduction was warranted, and that, we submit, was a proper exercise of his discretion.

There is a more fundamental flaw in Estremera's argument here. He asserts, at various points in his brief, that his "rehabilitation" is "uncontested" (Br. 21), and that he has "achieved an attitude of respect for authority and for the law". (Br. 13). On the contrary,

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* A sentencing judge may properly consider unproven criminal activity of the defendant. *Williams* v. *New York*, 337 U.S. 241 (1949); *United States* v. *Needles*, 472 F.2d 652, 654-655 (2d Cir. 1973); *United States* v. *Doyle*, 348 F.2d 715, 721 (2d Cir.), *cert. denied*, 382 U.S. 843 (1965).

there is no evidence of this attitude whatever. Estremera's submissions demonstrate only that he has shown proficiency in the vocational training given him in prison. They contain not the slightest expression of remorse or contrition for his criminal acts. Conspicuously absent from his motion for reduction of sentence was any statement from the defendant expressing some awareness of the magnitude of his crimes, or some intention of leading a law abiding life upon release from prison.* Given this conspicuous omission, the prison reports of his vocational aptitude have minimal significance. This case is therefore the precise obverse of *United States* v. *Stein*, 544 F.2d 96 (2d Cir. 1976) on which Estremera relies in his brief. In *Stein*, this Court reversed the sentence imposed on Stein in part because the District Court appeared to have overlooked a supplemental presentence report which stated that Stein "admits his guilt, verbalizes remorse, and has been cooperating with the Government." 544 F.2d at 99. In addition, the reversal was also based on the trial court's refusal to let Stein be heard after sentence was imposed. Here, in contrast, Estremera has never admitted his guilt, never expressed remorse, never cooperated with the Government, and deliberately bypassed the opportunity to express himself both at the time of sentence and in his Rule 35 motion.**

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* Nor did Estremera express any contrition at the time of sentence (Tr. of June 24, 1975, at p. 24).

** Estremera's reliance on *United States* v. *Robin*, —— F.2d ——, Dkt. No. 76-1033 (2d Cir. October 15, 1976), is equally flawed. He argues that Judge Duffy, like the trial judge in *Robin*, "refused to consider evidence offered by the defendant on the issue of sentence". (Br. 14). The differences between *Robin* and the case at bar are fundamental. In *Robin*, there was a sharp factual dispute between the prosecution and the defense over the

[Footnote continued on following page]

Finally, we think it worth noting that any requirement that district judges follow the procedure Estremera asks this Court to impose upon Judge Duffy could have drastic implications for the work of trial judges. District judges are inundated with Rule 35 motions, few of which are granted. Any requirement that district judges receive and consider evaluative reports prepared by the Bureau of Prisons would unnecessarily compound the burdens that trial judges already bear. We submit that the draftsmen of Rule 35, in permitting the consideration of "pleas for leniency," surely had no such strictures in mind.*

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extent of the defendant's criminal activities. The trial judge appeared to accept the Government's version of the facts and refused even to entertain the defendant's rebuttal. The court's sentence was thus based on the Government's version alone. The Court's reversal of that sentence was based on the trial judge's apparent thwarting of the normal workings of the adversary process and her acceptance of what amounted to an *ex parte* presentation from the Government. The *Robin* case obviously has no application here: the Government presented no papers in rebuttal to Estremera's motion, and it thus can hardly be said that Judge Duffy accepted the Government's factual presentation and excluded Estremera's. Indeed, the only facts before Judge Duffy on this motion were presented by Estremera.

* Estremera also claims, in Point II of his brief, that Judge Duffy's denial of his motion subjects him to the "cruel and unusual punishment" of serving five and two-third years before he is eligible for parole. That argument, in light of *Gregg* v. *Georgia*, —— U.S. ——, 96 S.Ct. 2909 (July 2, 1976), is frivolous. As *Gregg* holds, a punishment is "cruel and unusual" only if it is, *inter alia*, "grossly out of proportion to the severity of the crime." 96 S.Ct. at 2925. 18 U.S.C. § 2113(d) prescribes a maximum sentence of 25 years for armed bank robbery; hence the requirement that one who has violated that statute serve five and two-thirds years can scarcely be deemed cruel and unusual punishment. See also *United States* v. *Seijo*, 537 F.2d 694, 700 (2d Cir. 1976). We respectfully submit that there is no disproportion between the crime Estremera committed and the sentence imposed upon him.

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Jeremy G. Epstein being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 26 day of January, 1977, he served ~~a~~ two copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

Jesse Berman, Esq.
357 Broadway
New York, NY 10013

And deponent further says that he sealed the said envelope and placed the same in the mail box for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

Jeremy G. Epstein

Sworn to before me this

26th day of January 1977

Mary L. Avent

MARY L. AVENT
Notary Public, State of New York
No. 03-4500237
Qualified in Bronx County
Cert. filed in Bronx County
Commission Expires March 30, 1977

ATTORNEY'S OFFICE
SOUTHERN DISTRICT OF